

NILSSON, ROBBINS, DALGARN, BERLINER,  
CARSON & WURST  
Harold E. Wurst  
Suite 4750, 707 Wilshire Boulevard  
Los Angeles, California 90017  
Telephone: (213) 620-0600

FILED

MAY 23 1979

TOWNSEND and TOWNSEND  
J. Thomas McCarthy  
Ronald S. Laurie  
Steuart Street Tower, 20th Floor  
One Market Plaza  
San Francisco, California 94105  
Telephone: (415) 543-9600

CLERK, U. S. DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
BY *[Signature]* DEPUTY

Attorneys for Plaintiff

*LA 420*

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

ASHLEIGH BRILLIANT, individually  
and dba BRILLIANT ENTERPRISES,

Civil Action No.

Plaintiff,

*79 1893 WMB (A+)*

-vs-

W.B. PRODUCTIONS, INC., a  
California corporation,

COMPLAINT FOR COPYRIGHT  
INFRINGEMENT

Defendant.

Plaintiff alleges:

1. This action arises under the Copyright Laws  
of the United States, Title 17, United States Code (U.S.C.)  
as more fully appears herein. Jurisdiction is conferred on  
this Court by 17 USC 501 and 28 USC 1338(a).

2. Plaintiff is an individual citizen of the  
State of California, with residence and business office in  
Santa Barbara, California, and was at all material times a  
citizen and domicilliary of the United States.

*5*

*1*

1           3. Defendant is a California corporation with  
2 its principal place of business in Canoga Park, California,  
3 within the Central Judicial District.

4           4. Plaintiff created, drew and wrote a series of  
5 original greeting cards which were published as more fully  
6 appears herein.

7           5. Said greeting cards contain material wholly  
8 original with plaintiff and constituting copyrightable  
9 subject matter under the laws of the United States.

10          6. Plaintiff complied in all respects with the  
11 United States Copyright Laws and secured the exclusive  
12 rights and privileges in and to the copyright in said cards  
13 and in each and all component parts thereof and received  
14 from the Register of Copyrights certificates of registration,  
15 as identified in Paragraph 9 below.

16          7. Commencing upon the respective dates of first  
17 publication set forth in Paragraph 9 below and thereafter,  
18 said greeting cards of plaintiff have been published by  
19 authority of plaintiff in conformity with the provisions of  
20 the United States Copyright Laws.

21          8. Since creation and publication of said cards  
22 plaintiff has been and still is the sole proprietor of all  
23 rights, title and interest in and to the copyright in said  
24 cards and all the component parts thereof.

25          9. After the respective dates of first publica-  
26 tion set forth below and within three years preceding the  
27 filing of this Complaint, defendant has willfully infringed  
28 the copyright in said greeting cards by publishing and

1 selling T-shirt transfers containing wording as set forth  
2 below that was copied in whole or in substantial part from  
3 plaintiff's copyrighted cards. A comparison of plaintiff's  
4 copyrighted cards (and the pertinent Certificates of Registra-  
5 tion) with defendant's transfers copied therefrom is set  
6 forth below:

7                   A. Brilliant Card No. 433 (copy attached  
8 as Exhibit 1A)

9  
10                   Protectable wording thereon:

11                   "I MAY NOT BE TOTALLY PERFECT, BUT  
12                   PARTS OF ME ARE EXCELLENT."

13                   Published: October 15, 1973

14                   Registration No. A-506390 (copy  
15 attached hereto as Exhibit 1B);

16  
17                   Defendant's transfer wording: "I MAY  
18 NOT BE TOTALLY PERFECT, BUT PARTS OF  
19 ME ARE EXCELLENT." (copy attached  
20 hereto as Exhibit 1C);

21  
22                   B. Brilliant Card No. 826 (copy attached  
23 as Exhibit 2A)

24  
25                   Protectable wording thereon: "I HAVE  
26 ABANDONED MY SEARCH FOR TRUTH, AND  
27 AM NOW LOOKING FOR A GOOD FANTASY."

28                   Published: October 21, 1975



1 Registration No. A-703713 (copy  
2 attached hereto as Exhibit 2B);

3  
4 Defendant's transfer wording: "I  
5 HAVE ABANDONED MY SEARCH FOR TRUTH  
6 AND AM NOW LOOKING FOR A GOOD FANTASY."  
7 (copy attached hereto as Exhibit 2C);

8  
9 C. Brilliant Card No. 283 (copy attached  
10 hereto as Exhibit 3A)

11  
12 Protectable wording thereon:

13 "I'M IN SEARCH OF MYSELF -- HAVE  
14 YOU SEEN ME ANYWHERE?"

15 Published: July 28, 1971

16 Registration No. A-285585 (copy  
17 attached hereto as Exhibit 3B);

18  
19 Defendant's transfer wording: "I'M  
20 TRYING TO FIND MYSELF...HAVE YOU  
21 SEEN ME LATELY?" (copy attached  
22 hereto as Exhibit 3C).

23 10. Plaintiff has notified defendant that defendant  
24 has infringed the above copyrights of plaintiff and notwith-  
25 standing such notice, defendant has continued to so infringe.

26 11. By reason of defendant's infringing acts  
27 alleged herein, plaintiff has and will suffer damage to its  
28 business, reputation and goodwill and the loss of sales and



1 profits plaintiff would have made but for defendant's acts.

2 12. Defendant threatens to continue to do the  
3 acts complained of herein, and unless restrained and enjoined,  
4 will continue to do so, all to plaintiff's irreparable  
5 damage. It would be difficult to ascertain the amount of  
6 compensation which could afford plaintiff adequate relief  
7 for such continuing acts, and a multiplicity of judicial  
8 proceedings could be required. Plaintiff's remedy at law is  
9 not adequate to compensate it for injuries threatened.

10 WHEREFORE, plaintiff prays for judgment as follows:

11 1. That defendant, its agents, servants, and  
12 employees and all persons in privity or acting in concert  
13 with them be enjoined during the pendency of this action and  
14 permanently thereafter from infringing said copyrights of  
15 plaintiff in any manner and from publishing, reproducing,  
16 and selling any copies of its infringing cards, under the  
17 authority of 17 USC 502.

18 2. That the Court order the impounding and  
19 destruction of all copies made or used in violation of  
20 plaintiff's exclusive rights and of all plates, masters, or  
21 other articles by means of which such copies may be reproduced,  
22 under the authority of 17 USC 503.

23 3. That defendant be ordered to pay to plaintiff:

24 A. Plaintiff's actual damages and  
25 any profits of defendant that are  
26 attributable to the infringement  
27 or statutory damages of \$50,000 for  
28 each of the copyrights willfully

1                   infringed by defendant, for total  
2                   statutory damages of \$150,000.

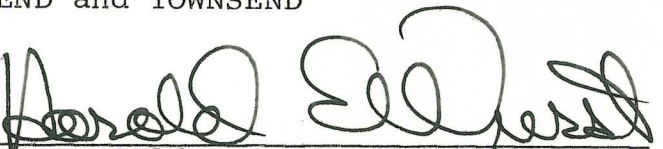
3                   B. Full costs and reasonable attorney's  
4                   fees for the prosecution of this  
5                   action.

6                   4. That the plaintiff have other and further relief  
7 as the Court shall deem just.

8  
9                   NILSSON, ROBBINS, DALGARN,  
10                  BERLINER, CARSON & WURST

11                  TOWNSEND and TOWNSEND

12  
13 By

A handwritten signature in dark ink, appearing to read 'Harold E. Wurst', is written over a horizontal line.

Harold E. Wurst  
Attorneys for Plaintiff

14  
15 Dated: MAY 22, 1979  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 WILLIAM A. FEINBERG,  
2 A PROFESSIONAL CORPORATION  
3 J. Kent O'Mara  
15910 Ventura Boulevard, #1833  
Encino, California 91436

4 Telephone: (213) 986-8383

5 Attorneys for Defendant

LODGED

JUN 21 3 12 PM '79

CLERK U.S. DISTRICT COURT  
CENTRAL DIST. OF CALIF.

FILED

BY

JUN 22 1979

8 UNITED STATES DISTRICT COURT  
9 FOR THE CENTRAL DISTRICT OF CALIFORNIA

CLERK, U. S. DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
DEPUTY

11 ASHLEIGH BRILLIANT, individually )  
and dba BRILLIANT ENTERPRISES, )  
12 )  
Plaintiff, )

CIVIL ACTION NO.  
CV 79 1893 WMB (PX)

13 vs. )

ANSWER TO COMPLAINT  
FOR COPYRIGHT INFRINGEMENT

14 W. B. PRODUCTIONS, INC., )  
15 California corporation, )  
16 Defendant. )

18 DEFENDANT HEREBY ANSWERS PLAINTIFF'S COMPLAINT AS FOLLOWS:

19 1. In answer to paragraph 1, defendant admits that if any  
20 cause of action exists, it arises under the Copyright Laws of the  
21 United States, Title 17, United States Code (U.S.C.) as said Title  
22 existed at the time said cause of action arose, and that jurisdic-  
23 tion is conferred on this court by 28 U.S.C. 1338(a). Defendant  
24 denies that jurisdiction is conferred by 17 U.S.C. 501, because  
25 if any cause of action exists, it arose under Title 17 before  
26 January 1, 1978 and is governed by Title 17 (U.S.C. Section 1, et  
27 seq.) as said Title existed when said cause of action arose. De-  
28 fendant denies all other averments of paragraph 1 of the Complaint.



1           2.    In answer to paragraphs 2, 4, 5, 6, 7, 8 and 11, defen-  
2   dant avers that it is without knowledge or information sufficient  
3   to form a belief as to the truth of the averments in said para-  
4   graphs, and therefore denies the same.

5           3.    In answer to paragraph 3, defendant admits the aver-  
6   ments contained therein.

7           4.    In answer to paragraph 9, defendant admits that within  
8   three years preceding the filing of the Complaint, it sold T-shirt  
9   transfers containing the words as set forth in Exhibits "1-C",  
10   "2-C" and "3-C" of the Complaint, and denies the remainder of the  
11   averments contained in said paragraph.

12          5.    In answer to paragraph 10, defendant admits that plain-  
13   tiff has notified defendant that defendant has infringed copy-  
14   rights, and denies the remainder of the averments contained in  
15   said paragraph.

16          6.    In answer to paragraph 12, defendant denies the aver-  
17   ments contained therein.

18

19

20

21           WHEREFORE, defendant prays that:

22           A.    Plaintiff's Complaint be dismissed with costs to plain-  
23   tiff;

24           B.    The Court find that the present action has been brought  
25   in bad faith, and that defendant is entitled to its reasonable  
26   attorneys' fees; and

27   ///

28   ///

1 C. The Court grant defendant such other relief as appears  
2 just and proper.

3  
4 Dated at Encino, California, this 19<sup>th</sup> day of June, 1979.

5  
6 WILLIAM A. FEINBERG,  
7 A PROFESSIONAL CORPORATION  
8 J. Kent O'Mara

9 By J. Kent O'Mara  
10 J. KENT O'MARA  
11 Attorneys for Defendant  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

# VERIFICATION

STATE OF CALIFORNIA, COUNTY OF

I, the undersigned, say:

I have read the foregoing \_\_\_\_\_ and know its contents.

## ☒ CHECK APPLICABLE PARAGRAPH

☐ I am a party to this action. The matters stated in it are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am ☐ an officer ☐ a partner \_\_\_\_\_ ☐ a \_\_\_\_\_ of \_\_\_\_\_

a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. I am informed and believe and on that ground allege that the matters stated in it are true.

☐ I am one of the attorneys for \_\_\_\_\_, a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in it are true.

Executed on \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_ California.

I declare under penalty of perjury that the foregoing is true and correct.

\_\_\_\_\_  
(Signature)

## ACKNOWLEDGMENT OF RECEIPT OF DOCUMENT (other than summons and complaint)

Received copy of document described as \_\_\_\_\_

on \_\_\_\_\_ 19\_\_\_\_.

\_\_\_\_\_  
(Signature)

## PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF Los Angeles

I am employed in the county of Los Angeles, State of California.

I am over the age of 18 and not a party to the within action; my business address is:  
15910 Ventura Boulevard, Suite 1833, Encino, California 91436

On June 20 1979, I served the foregoing document described as \_\_\_\_\_

ANSWER TO COMPLAINT FOR COPYRIGHT INFRINGEMENT

\_\_\_\_\_ on plaintiff's counsel  
in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at: Encino, California  
addressed as follows:

NILSSON, ROBBINS, DALGARN,  
BERLINER, CARSON & WURST  
Harold E. Wurst  
707 Wilshire Blvd., Suite 4750  
Los Angeles, California 90017

TOWNSEND and TOWNSEND  
J. Thomas McCarthy  
Ronald S. Laurie  
Steuart Street Tower, 20th Floor  
One Market Plaza  
San Francisco, California 94105

Executed on June 20, 1979 at Encino, California.  
(check applicable paragraph below)

☐ (State) I declare under penalty of perjury that the above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Nanette Weltman  
(Signature)  
Nanette Weltman



NILSSON, ROBBINS, DALGARN,  
BERLINER, CARSON & WURST  
Harold E. Wurst  
707 Wilshire Boulevard, Suite 4750  
Los Angeles, California 90017  
Telephone: (213) 620-0600

TOWNSEND AND TOWNSEND  
Ronald S. Laurie  
One Market Plaza  
Steuart Street Tower, 20th Floor  
San Francisco, California 94105  
Telephone: (415) 540-9600

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ASHLEIGH BRILLIANT, individually )  
and dba BRILLIANT ENTERPRISES, )  
Plaintiff, )  
v. )  
W. B. PRODUCTIONS, INC., a )  
California corporation, )  
Defendant. )

NO. C-79-1893-WMB(PX)

PLAINTIFF'S TRIAL MEMORANDUM OF LAW

/ / / / /

FILED  
SEP 17 9 09 AM '79  
CLERK U.S. DISTRICT COURT  
CENTRAL DIST. OF CALIF.  
BY

12

TABLE OF CONTENTS

	<u>Page</u>
I. Introduction. . . . .	1
II. The Present Action is Governed by the Copyright Law of the United States as it Existed Prior to January 1, 1978, the Effective Date of the Copyright Revision Act of 1976. . . . .	1
III. In a Copyright Infringement Action Where Defendants Profits Do Not Reflect Plaintiff's Injury and Where the Amount of Plaintiff's Actual Damages Is Not Readily Ascertainable, an Award of In-Lieu Damages is Appropriate . . . . .	2
IV. Plaintiff's Actual Damages Are Not Readily Ascertainable . . . . .	7
V. A Successful Plaintiff in a Copyright Infringement Action is Entitled to an Award of His Reasonable Attorneys' Fees Where the Defendant Deliberately Continues Copying After Receiving Written Notice of Infringement From Plaintiff . .	9
VI. Defendant's Transfer "I'm Trying to Find Myself . . . Have You Seen Me Lately?" is Substantially Similar to Plaintiff's Copyrighted Epigram "I'm in Search of Myself -- Have You Seen Me Anywhere?" and the Former Expression is Therefore an Infringement of the Copyright in the Latter Expression. . . . .	11
VII. Plaintiff's Certificates of Copyright Registration Covering the Epigrams in Suit Constitute Prima Facie Evidence That Plaintiff has Title to the Copyrights in Issue. . . . .	16
VIII. Conclusion . . . . .	17



## TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>I. CASES</u>	
<u>Addisson-Wesley Publ. Co. v. Brown</u> , 223 F.Supp. 219, 224 (D.C.N.Y., 1963) . . . . .	16
<u>Bell v. Pro Arts, Inc.</u> , 366 F.Supp. 474 (N.D. Ohio, 1973), <u>aff'd</u> 511 F.2d 451 (6th Cir., 1975). 6, 7, 8	6, 7, 8
<u>Bradbury v. Columbia Broadcasting System, Inc.</u> , 287 F.2d. 487 (9th Cir., 1961). . . . .	13
<u>Buck v. Bilkie</u> , 63 F.2d 447 (9th Cir., 1933). . . . .	9
<u>Cain v. Universal Pictures Co.</u> , 47 F.Supp. 1013, 1019 (S.D. Cal., 1942). . . . .	9
<u>Baldwin Cooke Co. v. Keith Clark, Inc.</u> , 420 F.Supp. 404 (N.D. Illinois, 1976) . . . . .	10
<u>Davis v. E.I. DuPont de Nemours &amp; Co.</u> , 249 F.Supp. 329, 344 (S.D.N.Y., 1966) . . . . .	5, 6, 10
<u>Doran v. Sunset House Distributing Corp.</u> , 197 F.Supp. 940 (C.D. Cal., 1961); <u>aff'd</u> 304 F.2d 251 (9th Cir., 1962). . . . .	9, 10
<u>Hedeman Products Corp. v. Tap-Rite Products Corp.</u> , 228 F.Supp. 630, 633 (D.N.J., 1964). . . . .	16
<u>Higgins v. Baker</u> , 309 F.Supp. 635 (S.D.N.Y., 1969) . . . . .	12, 13
<u>Henry Holt &amp; Co., Inc. v. Liggett &amp; Myers Tobacco Co.</u> , 23 F.Supp. 302 (D.C. Penn, 1938) . . . . .	12
<u>Sid and Marty Krofft Television v. McDonald's Corp.</u> , 562 F.2d 1157 (1977) . . . . .	3, 4
<u>Markham v. A.E. Bordon Co.</u> , 206 F.2d 199 (2nd Cir., 1953) . . . . .	15
<u>Edward B. Marks Music Corp. v. Borst Music Pub. Co.</u> , 110 F.Supp. 913 (D.C.N.J., 1953). . . . .	16
<u>Pic Design Corp. v. Sterling Precision Corp.</u> , 231 F.Supp. 106 (D.C.N.Y., 1964). . . . .	15
<u>Pye v. Mitchell</u> , 574 F.2d 476 (1978). . . . .	1, 3, 4, 5
<u>Rexnord, Inc. v. Modern Handling Systems, Inc.</u> , 379 F.Supp. 1190 (D.C. Del., 1974). . . . .	15



	<u>Page(s)</u>
1	
2	<u>Robinson v. Bantam Books, Inc., 339 F.Supp.</u>
3	<u>150 at 157, 158 (D.C.N.Y., 1972) . . . . .</u> 10
4	<u>Samet &amp; Wells, Inc. v. Shalom Toy Co., Inc.,</u>
5	<u>429 F.Supp. 895 at 904 (S.D.N.Y., 1977). . . . .</u> 10
6	<u>Telex Corp. v. International Business Machines</u>
7	<u>Corp., 179 U.S.P.Q. 777 (D.C. Okl, 1973) . . . .</u> 13
8	II. <u>STATUTES</u>
9	Copyright Act of 1909, As Amended:
10	17 U.S.C.A. §3. . . . . 15
11	17 U.S.C.A. 101(b). . . . . 2, 3, 4
12	17 U.S.C.A. §116. . . . . 9
13	17 U.S.C.A. §209. . . . . 16
14	Copyright Revision Act of 1976:
15	Section 112 of Public Law No. 94-553. . . . 1
16	III. <u>TREATISES</u>
17	Nimmer on Copyright (1976 Ed.), Sec. 143.3 at
18	p. 632-633 . . . . . 14
19	Nimmer on Copyright (1976 Ed.), Sec. 143.12 at
20	p. 629 . . . . . 11, 12
21	Nimmer on Copyright (1976 Ed.), Sec. 161 at
22	p. 705 . . . . . 10
23	
24	
25	
26	
27	
28	

I. INTRODUCTION

Under the Order Re Pre-trial and Trial entered by the Court on September 12, 1979, only the following three matters are to be decided at trial:

1. The issue of whether title to the three copyright registrations in suit (Exhibits 1B, 2B and 3B to the Complaint) resides in plaintiff;
2. The defense of noninfringement of the copyright registration attached to the Complaint as Exhibit 3B; and
3. The issue of damages, including attorneys' fees, costs and under which Federal Copyright Law plaintiff's claims arise.

This memorandum will address the above three issues in reverse order.

II.

THE PRESENT ACTION IS GOVERNED BY THE COPYRIGHT LAW OF THE UNITED STATES AS IT EXISTED PRIOR TO JANUARY 1, 1978, THE EFFECTIVE DATE OF THE COPYRIGHT REVISION ACT OF 1976

---

Section 112 of Public Law No. 94-553, one of the "Transitional and Supplementary Provisions" of the Copyright Revision Act of 1976 provides that "All causes of action that arose under title 17 before January 1, 1978, shall be governed by title 17 as it existed when the cause of action arose". This Section has been applied by the Ninth Circuit Court of Appeals in Pye v. Mitchell, 574 F.2d 476 (1978).

1 In the present case, plaintiff's cause of action for copy-  
2 right infringement arose well prior to January 1, 1978, and  
3 is thus governed by the Copyright Act of 1909 as subse-  
4 quently amended.

6 III.

7 IN A COPYRIGHT INFRINGEMENT ACTION WHERE DEFENDANT'S  
8 PROFITS DO NOT REFLECT PLAINTIFF'S INJURY AND WHERE  
9 THE AMOUNT OF PLAINTIFF'S ACTUAL DAMAGES IS NOT READILY  
10 ASCERTAINABLE, AN AWARD OF IN-LIEU DAMAGES IS APPROPRIATE

11  
12 Section 101(b) of the Copyright Act of 1909 (17 U.S.C.A.  
13 101(b)) governs the award of damages in the present case and  
14 provides in pertinent part:

15 "§101. Infringement

16 If any person shall infringe the copyright in any  
17 work protected under the copyright laws of the United  
18 States, such person shall be liable:

19 \* \* \*

20 (b) Damages and profits; amount; other remedies --  
21 To pay to the copyright proprietor such damages as the  
22 copyright proprietor may have suffered due to the in-  
23 fringement, as well as all the profits which the in-  
24 fringer shall have made from such infringement . . .  
25 or in lieu of actual damages and profits, such damages  
26 as to the court shall appear to be just, and in as-  
27 sessing such damages the court may, in its discretion,  
28 allow the amounts as hereinafter stated . . .



\* \* \*

Second. In the case of any work enumerated in section 5 of this title, except a painting, statue or sculpture, \$1 for every infringing copy made or sold by or found in the possession of, the infringer or his agents or employees." (emphasis added).

Two recent decisions in which the Ninth Circuit Court of Appeals considered the question of when an award of "in-lieu" damages is proper are Sid and Marty Krofft Television v. McDonald's Corp., 562 F.2d 1157 (1977) and Pye v. Mitchell, 574 F.2d 476 (1978). In the Krofft case, the court held that,

"If either profits or actual damages or both are ascertained, the court, in its discretion, may award statutory 'in lieu' damages." (Supra at 1178; emphasis original).

In Krofft it was noted that the courts are in agreement that a successful plaintiff is entitled to at least the greater of damages or profits. (Supra, p. 1172). The Court in Krofft further held that where neither plaintiff's actual damages nor defendant's actual profits are ascertained, the award of statutory in-lieu damages is mandatory although the amount of such recovery remains discretionary. (Supra at 1179).

In the present case, as a practical matter plaintiff's actual damages are not ascertainable because the injury to his reputation as an author and to his ability to success-

1 fully license his epigrams is not capable of precise measure-  
2 ment (see *infra*). As to defendant's profits, while these  
3 may be ascertainable, they are minimal in amount and are  
4 wholly inadequate as a measure of plaintiff's injury. Since  
5 plaintiff is entitled to the greater of plaintiff's damages  
6 or defendant's profits (Krofft, supra), if the amount of his  
7 actual damages were ascertainable, this would be the proper  
8 measure of his recovery. However, such damages cannot be  
9 determined with precision and this is one of those situa-  
10 tions in which the application of the in-lieu damage pro-  
11 vision is especially appropriate. The court should exercise  
12 its discretion in awarding plaintiff in-lieu damages.

13 What about the amount of the in-lieu damages which the  
14 court should award? Because the in-lieu damage provision  
15 was intended to cover situations where actual damages are  
16 not readily ascertainable, Congress saw fit to include what  
17 have been called "yardsticks" within the statute for the  
18 guidance of courts. The yardstick which applies to the  
19 present case is:

20 "\$1 for every infringing copy made or sold by or found  
21 in the possession of the infringer . . ." (17 U.S.C.A.  
22 101(b), supra p. 3).

23 Based on documentary evidence which will be presented at  
24 trial, the amount of damages should be fixed at \$12,447.00.

25 Any contention that such an award would violate the  
26 statutory maximum limitation of \$5,000.00 per infringement  
27 in §101(b) has no merit. In the Pye case, supra, the court  
28 noted the statutory language in Section 101(b) which follows



1 the statement of the various maximum and minimum limitations  
2 on recovery to the effect that the limitations do not apply  
3 to infringements occurring after actual notice, either by  
4 service of process or "other written notice", the court  
5 stating,

6 "Once actual notice releases the court from the stric-  
7 tures of the statutory limitations, the court is bound  
8 only by the language which allows 'such damages as  
9 . . . shall appear to be just'." (Supra at 482).

10 The Court in Pye then noted the "dearth of authority" as to  
11 just what constitutes actual notice within the meaning of  
12 the statute and after reviewing the authorities concluded,

13 "We agree that 'by specifying that written notice other  
14 than service of process will suffice, Congress has  
15 quite surely indicated that one need not already have  
16 become a defendant for written notice to be effective".  
17 Davis v. E.I. DuPont de Nemours & Co., 249 F.Supp. 329,  
18 344 (S.D.N.Y., 1966).

19 \* \* \*

20 "Congress did not prescribe the form of the notice but  
21 legislative history indicates that 'ordinary notice'  
22 terminates protection. Written notice is made the  
23 method by which innocent and willful infringers are  
24 distinguished." (Supra at 482-483).

25 The Davis case cited by the Ninth Circuit in Pye held that a  
26 letter or telegram is sufficient written notice to remove  
27 the statutory limitations. In Davis, supra, the court ob-  
28 served,



1 "No reason has been pointed out why Congress would have  
2 intended to shield an infringer who has been given full  
3 notice until after the arbitrary point in time when the  
4 copyright owner has been able to draw up and file a  
5 complaint against him." Supra, p. 344.

6 See also Bell v. Pro Arts, Inc., 366 F.Supp. 474 (N.D. Ohio,  
7 1973), aff'd 511 F.2d 451 (6th Cir., 1975), where the court  
8 held that an infringement notice letter sent by certified  
9 mail was proper written notice under the statute.

10 In the present action, on October 18, 1977, defendant  
11 W.B. Productions received a certified letter from plaintiff  
12 demanding that it cease its infringement of plaintiff's  
13 copyrighted epigrams. Defendant continued to infringe  
14 plaintiff's copyrights after receipt of this letter and two  
15 subsequent letters dated respectively November 7, 1977 and  
16 February 9, 1978. This willful and deliberate infringement  
17 persisted for over a year until suit was filed. Defendant's  
18 blatant continuing infringement after receiving written  
19 notice removes any statutory limitations on the amount of  
20 in-lieu damages to be awarded. Accordingly, the court is  
21 authorized under the statute to award "such damages as shall  
22 appear just."

23 Applying the above legal principles to the facts of the  
24 present case, the following seems clear:

- 25 1. The court should exercise its discretion in  
26 awarding plaintiff in-lieu damages under §101(b)  
27 of the Copyright Statute;
- 28 2. The measure of damages is found within the Statute

itself -- \$1.00 per infringing copy -- for a total  
of \$12,447.00;

3. The statutory limitation of \$5,000.00 per infringement has no applicability in the present case since defendant deliberately continued to order and sell infringing copies after receiving written notice of plaintiff's claim.

## IV.

PLAINTIFF'S ACTUAL DAMAGES ARE NOT READILY ASCERTAINABLE

The amount of the injury to plaintiff's reputation and to his ability to license others to use his copyrighted epigrams caused by defendant's deliberate infringement cannot be accurately measured.

Ashleigh Brilliant's reputation as an author has been damaged by defendant's willful infringement of his copyrighted epigrams. Defendant's reproduction of three of those epigrams without proper copyright notice -- which would have indicated authorship in Mr. Brilliant -- has created the impression that he is not in fact the author of this material and that it is not protected by copyright. This injury is particularly aggravated by the fact that one of the three epigrams infringed by defendant is Mr. Brilliant's most well known message and the title of his recently published book.

A decision which is squarely in point is Bell v. Pro Arts, Inc., 366 F.Supp. 474 (N.D. Ohio, 1973) aff'd 511 F.2d



1 451 (6th Cir., 1975) in which the court awarded statutory  
 2 in-lieu damages in a copyright infringement action involving  
 3 the popular "Desiderata" poem written and copyrighted by Max  
 4 Ehrmann. In Bell the court found that the plaintiff had  
 5 been damaged in an amount which was not readily ascertain-  
 6 able regardless of the actual number of infringing copies  
 7 sold by defendant. The court found that beach scene posters  
 8 sold by defendant both before and after notice reproducing  
 9 the full text of the poem without copyright notice damaged  
 10 plaintiff in an amount which was not readily ascertainable  
 11 because it "denied plaintiffs' copyright rights by inferring  
 12 no such copyright rights existed." (Supra at 484).

13 Another element of plaintiff's damage which is not  
 14 readily ascertainable is the injury to his ability to li-  
 15 cense his epigrams to third parties for use on various  
 16 products and in various communications media. In addition  
 17 to publishing his "POT-SHOTS" postcards, plaintiff also  
 18 licenses his epigrams to third parties for use on greeting  
 19 cards, tote bags, T-shirts, etc., as well as their use in  
 20 nationally syndicated newspapers. If a potential licensee's  
 21 competitors infringe plaintiff's copyrights by using his  
 22 epigrams without permission -- and without royalty --they  
 23 gain a competitive advantage over those who would rather be  
 24 a licensee than a pirate. The net result is an inhibiting  
 25 effect on Mr. Brilliant's ability to obtain a fair royalty  
 26 for the use of his epigrams and even to acquire licensees in  
 27 the first instance.

28 / / / / / /



V.

A SUCCESSFUL PLAINTIFF IN A COPYRIGHT INFRINGEMENT ACTION  
IS ENTITLED TO AN AWARD OF HIS REASONABLE ATTORNEYS' FEES  
WHERE THE DEFENDANT DELIBERATELY CONTINUES COPYING AFTER  
RECEIVING WRITTEN NOTICE OF INFRINGEMENT FROM PLAINTIFF

---

Under 17 U.S.C.A. §116, it is mandatory for the court  
to allow "full costs" to the prevailing party, but within  
the court's discretion as to whether to award a "reasonable  
attorney fee" as part of the costs. Courts have generally  
held that attorneys' fees

"should not be awarded unless equity considerations  
exist which call for penalization of the losing party".  
Cain v. Universal Pictures Co., 47 F.Supp. 1013, 1019  
(S.D. Cal. 1942).

One of the factors justifying the "penalization" of a  
losing defendant in a copyright infringement action is where  
the defendant's copying was deliberate, either ab-initio or  
after receiving written notice of infringement from the  
plaintiff. Doran v. Sunset House Distributing Corp., 197  
F.Supp. 940 (C.D. Cal. 1961); aff'd 304 F.2d 251 (9th Cir.,  
1962); Buck v. Bilkie, 63 F.2d 447 (9th Cir., 1933).

In Doran, Judge Byrne pointed out that an award of  
attorneys' fees is especially appropriate if the deliberate  
infringement produces

". . . the overall result that defendants not only  
captured part of plaintiff's market, but also injured  
the reputation of plaintiff's product." Doran, supra

1 at p. 950.

2 The "Doran Rule" has been echoed by federal courts in  
3 other districts. For example, in Baldwin Cooke Co. v. Keith  
4 Clark, Inc., 420 F.Supp. 404 (N.D. Illinois, 1976) the court  
5 observed:

6 "an award of attorneys fees is most appropriate in  
7 those cases in which a defendant has engaged in patent,  
8 flagrant, intentional infringement." (Supra p. 409;  
9 emphasis added).

10 In discussing the appropriateness of awarding attorneys'  
11 fees, the court in Baldwin Cooke also noted that the attor-  
12 neys' fees were not excessive because

13 "Through their [plaintiff's counsel] efforts (as well  
14 as the efforts of defendant's counsel) the trial on the  
15 issue of infringement was conducted on a stipulated  
16 record. Through their efforts (as well as the efforts  
17 of defendant's counsel) much of the evidence with  
18 respect to possible damages was stipulated to the end  
19 that only three days of court time were consumed in  
20 that hearing." Supra at p. 409.

21 See also Robinson v. Bantam Books, Inc., 339 F.Supp. 150 at  
22 157, 158 (D.C.N.Y., 1972); Samet & Wells, Inc. v. Shalom Toy  
23 Co., Inc., 429 F.Supp. 895 at 904 (S.D.N.Y., 1977); Davis  
24 v. E.I. DuPont, 57 F.Supp. 729 (SDNY, 1966); Nimmer on  
25 Copyright (1976 Ed.), Sec. 161 at p. 705.

26 Under the above authorities plaintiff is entitled to  
27 recover his reasonable attorneys' fees in this case.

28 / / / / /



VI.

DEFENDANT'S TRANSFER "I'M TRYING TO FIND MYSELF . . . HAVE  
YOU SEEN ME LATELY?" IS SUBSTANTIALLY SIMILAR TO PLAINTIFF'S  
COPYRIGHTED EPIGRAM "I'M IN SEARCH OF MYSELF -- HAVE YOU SEEN  
ME ANYWHERE?" AND THE FORMER EXPRESSION IS THEREFORE AN  
INFRINGEMENT OF THE COPYRIGHT IN THE LATTER EXPRESSION

---

Side-by-side comparison of the two expressions reveals  
the following similarities and differences:

I'M	{	IN SEARCH OF	}	MYSELF	{	—	}
		TRYING TO FIND				. . .	
HAVE YOU SEEN ME	{	ANYWHERE	}	?			
		LATELY					

The portions of the two expressions which are not  
identical -- the bracketed words above -- are: (a) equiva-  
lent expressions; and (b) qualitatively (and quantitatively)  
less important constituents of the total expression than the  
identical material. Under the legal principles discussed  
below the expressions are "substantially similar."

Professor Nimmer describes the present situation as one  
of "fragmented literal similarity" and states,

"The question in each case is whether the similarity  
relates to matter which constitutes a substantial  
portion of plaintiff's work -- not whether such mate-  
rial constitutes a substantial portion of defendant's  
work. The quantitative relation of the similar mate-  
rial to the total material contained in plaintiff's



1 work is certainly of importance. However, even if the  
2 similar material is quantitatively small, if it is  
3 qualitatively important the trier of fact may properly  
4 find substantial similarity. In such circumstances the  
5 defendant may not claim immunity on the grounds that  
6 the infringement 'is such a little one'." Nimmer on  
7 Copyright (1976 Ed.), Sec. 143.12 at p. 629; emphasis  
8 added.

9 A leading case in this area is Henry Holt & Co., Inc.  
10 v. Liggett & Myers Tobacco Co., 23 F.Supp. 302 (D.C. Penn.,  
11 1938). In the Holt case the court held that defendant's  
12 advertising pamphlet which used three sentences from plain-  
13 tiff's book, was "substantially similar" to the book and  
14 constituted copyright infringement, the court stating,

15 "In order to constitute an infringement of the copyright  
16 of a book, it is not necessary that the whole or even a  
17 large portion of the book shall have been copied. It  
18 is sufficient if a material and substantial part shall  
19 have been copied, even though it be but a small part  
20 of the whole . . . . The reproduction need not be literal  
21 and exact; it is a piracy if it appears that the copy-  
22 righted work has been copied although altered or  
23 paraphrased." (Supra at 303-304; emphasis added).

24 Other courts have followed this test of substantial  
25 similarity. The court in Higgins v. Baker, 309 F.Supp. 635  
26 (S.D.N.Y., 1969) which found that the copyright in plain-  
27 tiff's book had been infringed, stated,

28 "Even assuming the accuracy of defendant's computations

1 which indicate that only eight percent of Reich's works  
2 were copied, this does not conclusively establish  
3 the insubstantiality of the copying. Similar material,  
4 however small in quantity, may still be deemed sub-  
5 stantial if qualitatively important . . ." (Supra at  
6 p. 637; emphasis added).

7 In Telex Corp. v. International Business Machines Corp.,  
8 179 U.S.P.Q. 777 (D.C. Okl., 1973), the court applied the  
9 same standard:

10 "The fact that some pages of infringing telex manuals  
11 do not contain infringing material copied from I.B.M.  
12 manuals does not exonerate Telex from the portion which  
13 it infringed, for the presence of original elements  
14 in the copied matter does not relieve the infringer  
15 of liability if the infringed material is substantial."  
16 (Supra at p. 799; emphasis added).

17 In the present case defendant clearly copied a substan-  
18 tial portion of plaintiff's epigram. Significantly, the  
19 syntactical structure of the two expressions is identical --  
20 i.e., "I'm . . . myself, Have you seen me . . .?" In  
21 Bradbury v. Columbia Broadcasting System, Inc., 287 F.2d.  
22 478 (9th Cir., 1961) the Ninth Circuit Court stated,

23 "The test of infringement is whether the work is re-  
24 cognizable by an ordinary observer as having been taken  
25 from the copyrighted source. Slight differences and  
26 variation will not serve as a defense." (Supra at  
27 p. 485; emphasis added).

28 An important factor which the courts have considered in



1 determining substantial similarity is the relative contribu-  
2 tion in a qualitative sense of the dissimilar material:

3 "It is sometimes said that in determining substantial  
4 similarity, consideration should be given not only to  
5 the value or importance of the similar material as it  
6 appears in the plaintiff's work, but also to its rela-  
7 tive value and importance as it appears in the defen-  
8 dant's work . . . It is entirely immaterial that in  
9 many respects plaintiff's and defendant's works are  
10 dissimilar if in other respects similarity as to a  
11 substantial element of plaintiff's work can be shown.

12 No plagiarist can excuse the wrong by showing how much  
13 of his work he did not pirate . . . At times, however,  
14 items or elements of dissimilarity may be taken as evi-  
15 dence of copying. Thus where the language used in the  
16 two works was the same but for the inversion of certain  
17 words, or the substitution of one word for another, it  
18 was held that 'this crude effort to give the appearance  
19 of dissimilarity is itself evidence of copying'". Nimmer  
20 on Copyright (1976 Ed.), Sec. 143.3 at p. 632-633;  
21 emphasis added.

22 For example, in the present case the word "anywhere"  
23 relates to physical location in space, while the word "lately"  
24 relates to position in time. The equivalence of space and  
25 time from a theoretical point of view is well known to  
26 those with a background in advanced physics; however the  
27 same relation is intuitively sensed by those who do not have  
28 the benefit of such training.



1 Defendant may contend that Exhibit 3C is not an in-  
2 fringement of the corresponding one of plaintiff's copy-  
3 righted epigrams because the epigram was registered in the  
4 form of a "POT-SHOTS" postcard which was submitted under the  
5 same application as fifty-three other similar postcards  
6 published on the same date, each containing a different  
7 epigram. From this fact defendant may argue that it has  
8 copied only one "page" out of a fifty-three page "book".  
9 This contention has no merit.

10 Section 3 of the 1909 Copyright Act provides in per-  
11 tinent part,

12 ". . . The copyright upon composite works or  
13 periodicals shall give to the proprietor thereof all  
14 the rights in respect thereto which he would have if  
15 each part were individually copyrighted under this  
16 title." (17 U.S.C.A. §3).

17 The definition of "composite works" is found in Markham  
18 v. A.E. Bordon Co., 206 F.2d. 199 (2nd Cir., 1953):

19 "'Composite works' are those which contain distin-  
20 guishable parts which are separately copyrightable.

21 (Supra at 201).

22 See also Rexnord, Inc. v. Modern Handling Systems, Inc., 379  
23 F.Supp. 1190 (D.C. Del., 1974); and Pic Design Corp. v.  
24 Sterling Precision Corp., 231 F.Supp. 106 (D.C.N.Y., 1964).

25 The group of plaintiff's "POT-SHOTS" cards which were  
26 published on the same date and registered under the same  
27 certificate constitute a "composite work". Each distin-  
28 guishable and separate copyrightable portion of the compo-

1 site work -- i.e., each individual card -- is protectable to  
2 the same extent as if it were individually registered.

4 VII.

5 PLAINTIFF'S CERTIFICATES OF COPYRIGHT REGISTRATION  
6 COVERING THE EPIGRAMS IN SUIT CONSTITUTE PRIMA FACIE  
7 EVIDENCE THAT PLAINTIFF HAS TITLE TO THE COPYRIGHTS IN ISSUE

8  
9 A certificate of copyright registration is prima facie  
10 evidence of title and of all that appears on the face of the  
11 certificate. 17 U.S.C.A §209; Hedeman Products Corp. v.  
12 Tap-Rite Products Corp., 228 F.Supp. 630, 633 (D.N.J.,  
13 1964); Addisson-Wesley Publ. Co. v. Brown, 223 F.Supp. 219,  
14 224 (D.C.N.Y., 1963); Edward B. Marks Music Corp. v. Borst  
15 Music Pub. Co., 110 F.Supp. 913 (D.C.N.J., 1953). These  
16 cases hold that the plaintiff makes a prima facie case of  
17 title by introduction of a certificate of copyright registra-  
18 tion in his name. The burden of going forward with the  
19 evidence to show that plaintiff's title is defective then  
20 shifts to defendant. In the present case the Register of  
21 Copyrights duly issued the three registrations in suit to  
22 plaintiff who will testify that he has not transferred any  
23 part of that title to any other person.

24 / / / / / /

25 / / / / / /

26 / / / / / /

27 / / / / / /

28 / / / / / /



VIII. CONCLUSION

At trial plaintiff will show that for more than a year and a half after learning of plaintiff's copyright in the three epigrams in suit, defendant willfully and deliberately continued to have manufactured, to advertise and to sell unauthorized copies of plaintiff's work right up until the filing of suit. This blatant disregard of plaintiff's rights is nothing less than trade piracy. Under well settled principles of Copyright Law, plaintiff is entitled to an award of in-lieu damages in the amount of \$12,447.00 and to recover his reasonable attorneys' fees in connection with this action.

Respectfully submitted,

NILSSON, ROBBINS, DALGARN  
BERLINER, CARSON & WURST

TOWNSEND AND TOWNSEND

Dated: SEPT. 14, 1979. By Ronald S. Lammie  
Attorneys for Plaintiff

1 WILLIAM A. FEINBERG  
A PROFESSIONAL CORPORATION  
2 J. Kent O'Mara  
15910 Ventura Blvd., #1833  
3 Encino, CA 91436

4 Tel: (213) 986-8383

5 Attorneys for Defendant  
6  
7

FILED

SEP 18 1979

CLERK, U. S. DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
DEPUTY  
BY *[Signature]*

8 UNITED STATES DISTRICT COURT  
9 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
10

11 ASHLEIGH BRILLIANT, individually )	CIVIL ACTION NO.
and dba BRILLIANT ENTERPRISES, )	CV 79 1893 WMB (PX)
12 )	
Plaintiff, )	
13 )	DEFENDANT'S PROPOSED FINDINGS
vs. )	OF FACT AND CONCLUSIONS OF LAW
14 )	
W. B. PRODUCTIONS, INC., )	
15 a California Corporation )	
16 )	
Defendant. )	
17 )	

18 COMES NOW DEFENDANT W. B. PRODUCTIONS, INC., and herewith  
19 submits its proposed Findings of Fact and Conclusions of Law as  
20 follows:

21 FINDINGS OF FACT

22 1. Defendant W. B. Productions, Inc. is a corporation duly  
23 organized and existing under the laws of the State of California,  
24 with its principal place of business in the Canoga Park postal  
25 zone, City and County of Los Angeles, State of California.

26 2. Plaintiff Ashleigh Brilliant is an individual citizen  
27 of the State of California with residence and business office in  
28 Santa Barbara California, and plaintiff was at all material times



1 herein a citizen and domiciliary of the United States.

2 3. The Certificate of Registration identified in Exhibit  
3 1(b) to the Complaint on file herein has been altered since re-  
4 ceipt by plaintiff of said Certificate from the Registrar of Copy-  
5 rights.

6 4. The Certificate of Registration identified in Exhibit  
7 2(b) to the Complaint on file herein has been altered since re-  
8 ceipt by plaintiff of said Certificate from the Registrar of Copy-  
9 right.

10 5. The Certificate of Registration identified in Exhibit  
11 3(b) to the Complaint on file herein has been altered since re-  
12 ceipt by plaintiff of said Certificate from the Registrar of Copy-  
13 rights.

14 6. Plaintiff is not entitled to copyright protection with  
15 respect to the work depicted by Exhibit 1(a) to the Complaint on  
16 file herein in that plaintiff has failed to comply with the  
17 necessary statutory requirements in order to obtain such copyright.

18 7. Plaintiff is not entitled to copyright protection with  
19 respect to the work depicted by Exhibit 2(a) to the Complaint on  
20 file herein in that plaintiff has failed to comply with the  
21 necessary statutory requirements in order to obtain such copyright.

22 8. Plaintiff is not entitled to copyright protection with  
23 respect to the Exhibit 3(a) to the Complaint on file herein in  
24 that plaintiff has failed to comply with the necessary statutory  
25 requirements in order to obtain such copyright.

26 9. Defendant did not have access to the work as represented  
27 by Exhibit 1(a) to the Complaint prior to selling transfers  
28 similar to Exhibit 1(c) to the Complaint.

1 ideas between the expression of ideas contained within Exhibits  
2 2(a) and 2(c) to the Complaint.

3 21. There is no substantial similarity of expression of  
4 ideas between the expression of ideas contained within Exhibits  
5 3(a) and 3(c) to the Complaint.

6 22. Plaintiff suffered no actual damages from the sale by  
7 defendant of transfers similar to Exhibit 1(c) to the Complaint.

8 23. Plaintiff suffered no actual damages from the sale by  
9 defendant of transfers similar to Exhibit 2(c) to the Complaint.

10 24. Plaintiff suffered no actual damages from the sale by  
11 defendant of transfers similar to Exhibit 3(c) to the Complaint.

12 25. It has been necessary for defendant to retain the  
13 services of the Law Offices of William A. Feinberg, A Professional  
14 Corporation, attorneys at law duly licensed as such under the laws  
15 of the State of California, to represent defendant in connection  
16 with the within action.

17 CONCLUSIONS OF LAW

18 1. Plaintiff is not entitled to the protection of the fed-  
19 eral copyright law with respect to the copyrights identified in  
20 Exhibits 1(b), 2(b) and 3(b) to the Complaint on file herein.

21 2. Defendant has not infringed any copyright of plaintiff  
22 herein as contained in Exhibits 1(b), 2(b) and 3(b) to the Com-  
23 plaint on file herein.

24 3. Defendant is entitled to a judgment in the within action  
25 that plaintiff take nothing by virtue of his Complaint on file

26 ///

27 ///

28 ///



1 herein, and defendant is entitled to its costs of suit and its  
2 reasonable attorneys' fees.

3  
4 DATED: September 17, 1979.

5 WILLIAM A. FEINBERG  
6 A PROFESSIONAL CORPORATION

7 By J. Kent O'Mara  
8 J. KENT O'MARA  
9 Attorneys for Defendant  
10 W. B. PRODUCTIONS, INC.  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1        10. Defendant did not have access to the work as represented  
2 by Exhibit 2(a) to the Complaint prior to selling transfers  
3 similar to Exhibit 2(c) to the Complaint.

4        11. Defendant did not have access to the work as represented  
5 by Exhibit 3(a) to the Complaint prior to selling transfers similar  
6 to Exhibit 3(c) to the Complaint.

7        12. Defendant's profits from the sale of transfers similar  
8 to Exhibit 1(c) to the Complaint are no greater than \$1,515.51.

9        13. Defendant's profits from the sale of transfers similar  
10 to Exhibit 2(c) to the Complaint are no greater than \$167.20.

11       14. Defendant's profits from the sale of transfers similar  
12 to Exhibit 3(c) to the Complaint are not greater than \$208.81.

13       15. Defendant's employees were instructed by Elliot Levinson,  
14 President of W. B. Productions, Inc. to cease selling transfers  
15 similar to Exhibits 1(c), 2(c) and 3(c) to the Complaint upon  
16 receipt of notice that said transfers might infringe the copy-  
17 rights residing in plaintiff and represented by Exhibits 1(b),  
18 2(b) and 3(b) to the Complaint.

19       16. There is no substantial similarity of ideas between the  
20 ideas contained within Exhibits 1(a) and 1(c) to the Complaint.

21       17. There is no substantial similarity of ideas between the  
22 ideas contained within Exhibits 2(a) and 2(c) to the Complaint.

23       18. There is no substantial similarity of ideas between the  
24 ideas contained within Exhibits 3(a) and 3(c) to the Complaint.

25       19. There is no substantial similarity of expression of  
26 ideas between the expression of ideas contained within Exhibits  
27 1(a) and 1(c) to the Complaint.

28       20. There is no substantial similarity of expression of



## VERIFICATION

STATE OF CALIFORNIA, COUNTY OF \_\_\_\_\_

I, the undersigned, say:

I have read the foregoing \_\_\_\_\_ and know its contents.

☒ CHECK APPLICABLE PARAGRAPH

☐ I am a party to this action. The matters stated in it are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am ☐ an officer ☐ a partner \_\_\_\_\_ ☐ a \_\_\_\_\_ of \_\_\_\_\_

a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. I am informed and believe and on that ground allege that the matters stated in it are true.

☐ I am one of the attorneys for \_\_\_\_\_, a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in it are true.

Executed on \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_ California.

I declare under penalty of perjury that the foregoing is true and correct.

\_\_\_\_\_  
(Signature)

### ACKNOWLEDGMENT OF RECEIPT OF DOCUMENT (other than summons and complaint)

Received copy of document described as DEFENDANT'S PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW  
on Sept. 18 19 79.

\_\_\_\_\_  
(Signature)

### PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF \_\_\_\_\_

I am employed in the county of \_\_\_\_\_, State of California.  
I am over the age of 18 and not a party to the within action; my business address is: \_\_\_\_\_

On \_\_\_\_\_ 19\_\_\_\_, I served the foregoing document described as \_\_\_\_\_

\_\_\_\_\_ on \_\_\_\_\_  
in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at: \_\_\_\_\_  
addressed as follows:

Executed on \_\_\_\_\_, 19\_\_\_\_ at \_\_\_\_\_, California.  
(check applicable paragraph below)

☐ (State) I declare under penalty of perjury that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

\_\_\_\_\_  
(Signature)

## VERIFICATION

STATE OF CALIFORNIA, COUNTY OF \_\_\_\_\_

I, the undersigned, say:

I have read the foregoing \_\_\_\_\_ and know its contents.

☒ CHECK APPLICABLE PARAGRAPH

☐ I am a party to this action. The matters stated in it are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am ☐ an officer ☐ a partner \_\_\_\_\_ ☐ a \_\_\_\_\_ of \_\_\_\_\_

a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. I am informed and believe and on that ground allege that the matters stated in it are true.

☐ I am one of the attorneys for \_\_\_\_\_, a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in it are true.

Executed on \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_ California.

I declare under penalty of perjury that the foregoing is true and correct.

\_\_\_\_\_  
(Signature)

### ACKNOWLEDGMENT OF RECEIPT OF DOCUMENT (other than summons and complaint)

Received copy of document described as DEFENDANT'S PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW  
on Sept. 18 1979.

\_\_\_\_\_  
(Signature)

### PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF \_\_\_\_\_

I am employed in the county of \_\_\_\_\_, State of California.  
I am over the age of 18 and not a party to the within action; my business address is: \_\_\_\_\_

On \_\_\_\_\_ 19\_\_\_\_, I served the foregoing document described as \_\_\_\_\_

\_\_\_\_\_ on \_\_\_\_\_  
in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at: \_\_\_\_\_  
addressed as follows:

Executed on \_\_\_\_\_, 19\_\_\_\_ at \_\_\_\_\_, California.  
(check applicable paragraph below)

☐ (State) I declare under penalty of perjury that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

\_\_\_\_\_  
(Signature)



FILED

OCT 19 1979

CLERK, U. S. DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
DEPUTY

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ASHLEIGH BRILLIANT, individually )  
and dba BRILLIANT ENTERPRISES, )

Plaintiff, )

v. )

W. B. PRODUCTIONS, INC., a )  
California corporation, )

Defendant. )

CV 79-1893-WMB

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

This action came on for trial before this Court, the Honorable Wm. Matthew Byrne, Jr., presiding, and the Court having considered the pleadings and the memoranda filed, and the testimony and exhibits presented at the trial, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This is a suit for copyright infringement. The cause of action which forms the basis of plaintiff's claim arose prior to January 1, 1978.

2. Plaintiff, Ashleigh Brilliant, dba Brilliant Enterprises, is a writer and publisher by profession, and since 1967 has authored

20

1 numerous epigrams.

2         3. An "epigram," as defined by plaintiff and as used in  
3 this opinion, is a short statement (usually under seventeen words)  
4 intended to be pithy and humorous.

5         4. Since 1967, plaintiff's epigrams have been published by  
6 him or under his authority on a series of individual post cards  
7 collectively known as "POT-SHOTS". Each of these cards contains  
8 one of plaintiff's epigrams, together with a small line drawing  
9 which usually depicts a literal interpretation of the epigram.

10         5. Plaintiff published his "POT-SHOTS" cards in groups and  
11 obtained 14 Certificates of Registration of Claim to Copyright from  
12 the United States Copyright Office, each registration covering a  
13 group of cards published on the same date.

14         6. The three epigrams in question in this suit were regis-  
15 tered by plaintiff. These three epigrams, together with the number  
16 of the corresponding Certificate of Registration of Claim to Copy-  
17 right, are:

18             A. "I MAY NOT BE TOTALLY PERFECT, BUT PARTS OF ME ARE  
19 EXCELLENT."

20                 "POT-SHOTS" Card No. 433;  
21                 Published October 15, 1973;  
22                 Registration No. A-506390.

23             B. "I HAVE ABANDONED BY SEARCH FOR TRUTH, AND  
24 AM NOW LOOKING FOR A GOOD FANTASY."

25                 "POT-SHOTS" Card No. 826;  
26                 Published October 21, 1975;  
27                 Registration No. A-703713.

28             C. "I'M IN SEARCH OF MYSELF -- HAVE YOU SEEN ME  
ANYWHERE?"



1 "POT-SHOTS" Card No. 283;

2 Published July 28, 1971;

3 Registration No. A-285585.

4 7. Plaintiff has been and still is the sole owner of all  
5 right, title, and interest in and to the copyrights in the three  
6 works indicated as Findings of Fact 6A, 6B and 6C.

7 8. Plaintiff has licensed his epigrams to others for use on  
8 various items, such as greeting cards, tote bags, T-Shirts, cock-  
9 tail napkins, and the like, and his epigrams have appeared on a  
10 regular basis in as many as thirty nationally syndicated newspapers.

11 9. At various times between December, 1976, and December,  
12 1978, defendant W.B. Productions bought and resold heat transfers  
13 bearing his statements:

14 A. "I MAY NOT BE TOTALLY PERFECT BUT  
15 PARTS OF ME ARE EXCELLENT!"

16 B. "I HAVE ABANDONED MY SEARCH FOR TRUTH  
17 AND AM NOW LOOKING FOR A GOOD FANTASY"

18 C. "I'M TRYING TO FIND MYSELF . . .  
19 HAVE YOU SEEN ME LATELY?"

20 10. The heat transfers indicated as Findings of Fact 9A and  
21 9B were copied from plaintiff's epigrams indicated as Findings of  
22 Fact 6A and 6B respectively. The heat transfer indicated as 9C  
23 was not copied from plaintiff's epigram indicated as 6C.

24 11. The heat transfers indicated as Findings of Fact 9A and  
25 9B are substantially similar in expression to the epigrams indicat-  
26 ed as Findings of Fact 6A and 6B respectively. The heat transfer  
27 indicated as 9C is not substantially similar to the epigram  
28 indicated as 6C.

1           12. In October of 1977, plaintiff's counsel sent a certified  
2 letter to defendant notifying it that it was infringing plaintiff's  
3 copyrights and demanding termination of further production and sale  
4 of the infringing items and reimbursement to plaintiff for past acts  
5 of infringement. Several weeks later, plaintiff's counsel again  
6 wrote to defendant, enclosing a copy of the prior letter, together  
7 with copies of the three transfers, and stated that unless defendant  
8 responded, plaintiff would file suit for copyright infringement.  
9 Defendant's counsel responded by requesting copies of the copyright  
10 certificates covering the epigrams in question, which were immediate-  
11 ly provided. However, despite follow-up letters in February and  
12 July of 1978 from plaintiff's counsel, no further communication was  
13 received from defendant or its attorneys.

14           13. In March of 1979, plaintiff determined that defendant  
15 was still selling the subject transfers, and in May of 1979, plain-  
16 tiff filed the present action.

17           14. Defendant purchased and sold the subject transfers con-  
18 tinuously from late 1976 through early 1979, and defendant's sales  
19 of these transfers subsequent to receiving written notice of plain-  
20 tiff's ownership of copyright and his claim of infringement was  
21 knowing and deliberate and in willful disregard of plaintiff's  
22 copyrights.

23           15. The parties stipulate: that the defendant's gross prof-  
24 its derived from the sale of heat transfer indicated as 9A was the  
25 sum of \$1,115.00 and that the defendant's gross profits derived  
26 from the sale of heat transfer indicated as 9B was the sum of  
27 \$167.20.

28           16. Plaintiff has been damaged by the defendant's sale of



1 heat transfers designated as 9A and 9B in an amount which is impos-  
2 sible to calculate, but which is greater than the gross profits from  
3 the sales of these heat transfers by defendant.

4 17. Any Conclusions of Law, to the extent they are deemed  
5 to be Findings of Fact, are incorporated into these Findings of Fact.

6 CONCLUSIONS OF LAW

7 1. Any Findings of Fact, to the extent they are deemed to  
8 be Conclusions of Law, are incorporated into these Conclusions of  
9 Law.

10 2. The Court has jurisdiction under Title 28, United  
11 States Code § 1338(a) and the Copyright Act of 1909, Title 17,  
12 United States Code, §§ 101 and 116, and venue is proper.

13 3. On the basis of limited testimony and argumentation  
14 the Court finds that the three epigrams indicated in the Findings  
15 of Fact as 6A, 6B and 6C constitute copyrightable subject matter.

16 4. Plaintiff's copyright registrations covering the epi-  
17 grams in suit and his copyrights in the underlying epigrams are  
18 valid and enforceable at law.

19 5. The heat transfers indicated as Findings of Fact 9A and  
20 9B are substantially similar in expression to the epigrams indicat-  
21 ed as Findings of Fact 6A and 6B respectively. The heat transfer  
22 indicated as 9C is not substantially similar to the epigram  
23 indicated as 6C.

24 6. Defendant's has infringed plaintiff's copyright in his  
25 epigrams, "I MAY NOT BE TOTALLY PERFECT, BUT PARTS OF ME ARE  
26 EXCELLENT" and "I HAVE ABANDONED MY SEARCH FOR TRUTH AND AM NOW  
27 LOOKING FOR A GOOD FANTASY."

1 7. Because defendant's profits do not reflect plaintiff's  
2 injury, and the precise amount of plaintiff's actual damages cannot  
3 be reasonably ascertained, plaintiff is entitled to "in lieu"  
4 damages under Section 101(b) of the Copyright Act of 1909. Sid and  
5 Marty Krofft Television v. McDonald's Corp., 562 F.2d 1157 (9th Cir.  
6 1977); Pye v. Mitchell, 574 F.2d 476 (9th Cir. 1978); Bell v.  
7 Pro-Arts, Inc., 366 F. Supp. 474 (N.D. Ohio, 1973); aff'd 511 F.2d  
8 451 (6th Cir. 1975).

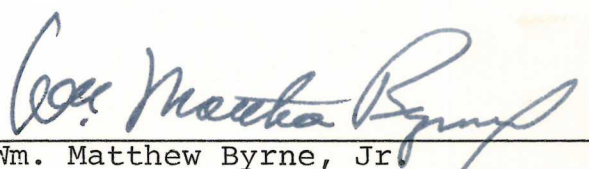
9 8. Plaintiff is entitled to in lieu damages for defendant's  
10 infringement of his epigram "I MAY NOT BE TOTALLY PERFECT, BUT PARTS  
11 OF ME ARE EXCELLENT," in the amount of \$5,000.00.

12 9. Plaintiff is entitled to in lieu damages for defendant's  
13 infringement of his epigram "I HAVE ABANDONED MY SEARCH FOR TRUTH  
14 AND AM NOW LOOKING FOR A GOOD FANTASY," in the amount of \$2,5000.00.

15 10. Because of defendant's continuing infringement after  
16 receiving written notice of plaintiff's copyright and claim of  
17 infringement, plaintiff is entitled to his reasonable attorney's  
18 fees, which by stipulation of the parties is determined to be  
19 \$10,000.00. Doran v. Sunset House Distrib. Corp., 197 F. Supp. 940  
20 (C.D. Cal. 1961); aff'd 304 F.2d 251 (9th Cir. 1962); Buck v.  
21 Bilkie, 63 F.2d 447 (9th Cir. 1933); Baldwin Cooke Co. v. Keith  
22 Clarke, Inc., 420 F. Supp. 404 (N.D. Ill. 1976); Samet & Wells,  
23 Inc. v. Shalom Toy Co., Inc., 429 F. Supp. 895 (S.D.N.Y. 1977).

24 11. Plaintiff is entitled to his costs of suit, which by  
25 stipulation of the parties, is determined to be \$500.00.

26 DATED: Oct 17, 1979

27   
28 Wm. Matthew Byrne, Jr.  
United States District Judge



JS-6  
FILED

OCT 19 1979

CLERK, U. S. DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
BY *[Signature]* DEPUTY

ENTERED  
OCT 22 1979

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CLERK, U. S. DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
BY DEPUTY

ASHLEIGH BRILLIANT, individually )  
and dba BRILLIANT ENTERPRISES, )

Plaintiff, )

v. )

W. B. PRODUCTIONS, INC., a )  
California corporation, )

Defendant. )

CV 79-1893-WMB

JUDGMENT

This action having duly come on for trial before this Court, the Honorable Wm. Matthew Byrne, United States District Judge, presiding, and the evidence presented by the parties having been heard, and the Court having made its Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the plaintiff complied with the Copyright Laws of the United States and obtained and is the owner of valid, subsisting and enforceable copyrights with regard to each of the following epigrams in suit:

///

MICROFILMED

NOV 10 1979

OCT 22 1979

Docketed  
Mid-copy Pys  
Mid Notice Pys  
JS-6

000015

1           Epigram No. 1:

2           "I MAY NOT BE TOTALLY PERFECT,  
3           BUT PARTS OF ME ARE EXCELLENT."

4           Published October 15, 1973

5           Registration Certificate No. A-506390;

6  
7           Epigram No. 2:

8           "I HAVE ABANDONED MY SEARCH FOR TRUTH,  
9           AND AM NOW LOOKING FOR A GOOD FANTASY."

10          Published October 21, 1975

11          Registration Certificate No. A-703713;

12  
13          Epigram No. 3:

14          "I'M IN SEARCH OF MYSELF --  
15          HAVE YOU SEEN ME ANYWHERE?"

16          Published July 28, 1971

17          Registration Certificate No. A-285585.

18  
19                 2.     That the defendant has infringed plaintiff's  
20     copyrights in Epigrams Nos. 1 and 2.

21                 3.     That the defendant has not infringed plaintiff's  
22     copyright in Epigram No. 3.

23                 4.     That the defendant, its agents, officers,  
24     attorneys and employees and all acting in concert or parti-  
25     cipation with them, be and hereby are permanently restrained  
26     and enjoined from offering for sale or selling heat transfers  
27     containing expressions identical or substantially similar to  
28     plaintiff's epigrams set forth above.



1           5.    That the defendant deliver up for destruction  
2 on or before the first day of November, 1979, to the Clerk of  
3 the United States District Court for the Central District of  
4 California, at his or her office in the United States Courthouse  
5 in Los Angeles, California, all infringing transfers now in  
6 its possession, or under its control, or which may hereafter  
7 come into its possession or control.


8           6.    That the plaintiff recover from the defendant  
9 statutory in-lieu damages under §101(b) of the Copyright Act  
10 of 1909 (Title 17, United States Code), in the amount of  
11 \$5,000.00 for infringement of plaintiff's Epigram No. 1, above,  
12 and in the amount of \$2,500.00 for infringement of plaintiff's  
13 Epigram No. 2, above, for a total award of damages of \$7,500.00.

14           7.    That the plaintiff recover from the defendant  
15 his reasonable attorney's fees in this action, which by  
16 stipulation of the parties are determined to be \$10,000.00.

17           8.    That the plaintiff recover from the defendant  
18 his costs of suit, which by stipulation of the parties are  
19 determined to be \$500.00.

20           9.    That the jurisdiction of this Court is retained  
21 for the purpose of making any further orders to carry into  
22 effect this judgment.

23  
24 Dated: Oct 17, 1979

  
UNITED STATES DISTRICT JUDGE